

The Mediation Agreement – Documenting the Deal

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Introduction

Most of the hard work has been done by the time the parties finally agree to settle the case. However, it is important to draft the mediation agreement to accurately specify the various terms of the settlement. The final release that is drafted by the defense counsel, subject to approval by Plaintiff's counsel, will be drafted in much greater detail than the mediation agreement. Therefore, I feel simpler is better. However, over the last several years the parties have wanted more detailed language in the agreement.

The goal of a mediation agreement is to draft it to fit various issues that have been agreed upon. The attached provisions address common issues that arise during the negotiation phase of the mediation. It is **NEVER** the intent to draft the mediation agreement as a substitute for the release.

STANDARD SETTLEMENT

John Doe v. Acme
In the Circuit Court of MY County, Alabama
Civil Action No.: CV15-9000000
Mediation Date: September 31, 2099
OUR FILE NO.: 15RBW-000

MEDIATION AGREEMENT

1. Defendant shall pay Plaintiff and her attorney \$_____, subject to execution of the release referenced below.
 2. Defendant's counsel shall prepare a complete release to include among other standard terms the following:
 - a. Confidentiality; and
 - b. Plaintiff shall pay all subrogation liens and/or unpaid medical bills related to this case and hold Defendant harmless.
- Said release shall be reviewed and approved by Plaintiff's counsel. Thereafter, said release shall be signed by Plaintiff.
3. The above-styled case shall be dismissed with prejudice; each to bear his/her/its own costs.

Dated this _____.

Plaintiff

Counsel for Plaintiff

Counsel for Defendant

MULTI-DEFENDANT SETTLEMENT

1. Defendants shall pay Plaintiff and his attorney a total amount of \$_____ to settle this case. The breakdown of the settlement proceeds are as follows:
 - a. Defendant One, \$_____;
 - b. Defendant Two, \$_____; and
 - c. Defendant Three, \$_____.

Also, all parties agree to release any and all claims of any nature against each other regarding the occurrence made the basis of this lawsuit and any coverage issues. _____ Insurance Company and _____ Insurance Company and/or _____ Insurance Company agree to waive all claims regarding indemnity and/or defense as to their respective insureds.

STRUCTURED SETTLEMENT

Defendant, _____'s, insurance carrier shall pay Plaintiff, and her attorney \$_____. Prior to issuance of drafts, Plaintiff will have the right to structure a portion of the funds and Defendant's carrier agrees to cooperate with Plaintiff's structure broker, _____, in establishing the structure.

PRO TANTO SETTLEMENT

PRO TANTO MEDIATION AGREEMENT

1. Defendant _____ shall pay Plaintiffs the sum of \$ _____, subject to execution of the release set forth below.

2. Defendant's counsel shall prepare a pro tanto release as to all claims against Brasfield & Gorie which will include among other standard terms the following:
 - a. Confidentiality; and

 - b. Plaintiffs shall be responsible for all medical liens/subrogation claims (including but not limited to Medicare) and will indemnify Defendant in connection with same.

Said *pro tanto* release shall be reviewed and approved by Plaintiffs' counsel. Thereafter, said *pro tanto* release shall be signed by Plaintiffs.

3. As to Defendant(s) _____ the case shall be dismissed with prejudice; each to bear his/her/its own costs, with the exception of the mediation costs which will be paid by Defendant. The case shall remain pending against all other defendants.

SETTLEMENT AGREEMENT INCLUDING CROSS-CLAIMS

1. Defendants shall pay Plaintiffs the total sum of \$ _____, in full and final settlement of all claims asserted or which could have been asserted in the referenced civil action. Plaintiffs shall execute a complete release in favor of all Defendants (including Third Party Defendants).

2. Defendants' counsel shall prepare a mutual release as to all claims, cross claims, and third party claims. Said release shall be reviewed and approved by all counsel. Thereafter, said release shall be signed by all parties.

3. The above-styled case shall be dismissed with prejudice; each to bear his/her/its own costs.

SETTLEMENT REQUIRING COURT APPROVAL

BANKRUPTCY

1. Defendant(s) shall pay \$_____ to _____, as Trustee of the Bankrupt Estate of _____ Case No: _____ to settle all claims in this case, subject to the Bankruptcy Court approval.
2. Defendant's counsel shall prepare a complete release of all claims as to all parties to include, confidentiality as a provision of the settlement, except as is necessary to obtain Bankruptcy Court approval.
3. If the settlement is approved by the Bankruptcy Court, the above-styled case shall be dismissed with prejudice; each to bear his/her/its own costs.

PRO-AMI

1. The insurance carrier for Defendant shall pay a global settlement in the amount of \$_____ to settle this case, subject to Court approval. The breakdown of the settlement proceeds shall be as follows:
 - a. Plaintiff One \$_____
 - b. Plaintiff Two, a minor, \$_____
 - c. Plaintiff Three, a minor, \$_____.
2. The parties and all counsel acknowledge that the proposed settlement of the claims of the minor children require Court approval and counsel will petition the Court for a hearing for such purpose.
3. Upon obtaining the Court's approval of the settlements involving the minor children, the case will be dismissed, with prejudice, each to bear his/her/its own costs, with the exceptions that the mediation costs which will be paid by Defendants and the Guardian ad Litem fees will be paid by Defendant(s).

DIRECT PAYMENT TO LIENHOLDERS BY INSURANCE CARRIER SETTLEMENT

1. Defendant shall pay Plaintiffs and their attorney \$_____, subject to execution of the release referenced below.
2. Defendant's counsel shall prepare a complete release to include among other standard terms the following:
 - a. Confidentiality; and
 - b. The subrogation lien of Medicare will be satisfied out of the settlement proceeds. Plaintiffs shall provide the Defendant's attorney with written confirmation from Medicare regarding amount required to satisfy the subrogation lien. Defendant's insurance carrier shall issue a check for the subrogation amount made payable to Medicare and pay the balance of the settlement amount by a check payable to the Plaintiffs and their attorney.**

Said release shall be reviewed and approved by Plaintiffs' counsel. Thereafter, said release shall be signed by Plaintiffs.

3. The above-styled case shall be dismissed with prejudice; each to bear his/her/its own costs, with the exception of the mediation costs which will be paid by Defendant.

CONTINGENT SETTLEMENT

CONTINGENT MEDIATION AGREEMENT

1. Defendant shall pay a total settlement of \$_____ to settle all claims in this case contingent on Plaintiff being able to satisfy the Medicare Lien for \$_____ or less.
2. Defendant's counsel shall prepare a complete release of all claims as to all parties to include, confidentiality and the following as provisions:
 - a. The subrogation lien of Medicare will be satisfied out of the settlement proceeds as stated above. Plaintiff shall provide the Defendant's counsel with written confirmation from Medicare regarding the amount required to satisfy the subrogation lien. Defendant shall then issue a check for the subrogation amount made payable to Medicare and pay the balance of the settlement amount by check payable to the Plaintiff and his attorneys; and
 - b. Plaintiff shall pay all other liens and/or unpaid medical bills related to this case and hold Defendant harmless. The parties agree that the only medical charges in this case relate to the injury to Plaintiff's shoulder.

Said release shall include, (Defendant's aka or variant subsidies). Said release shall be reviewed and approved by Plaintiff's counsel. Thereafter, said release shall be signed by Plaintiff.
3. The above-styled case shall be dismissed with prejudice; each to bear his/her/its own costs, with the exception of the mediation costs which will be paid by Defendant.

MEDICARE LIEN “HOLD-BACK” SETTLEMENT

MEDIATION AGREEMENT

1. Defendant shall pay a total settlement of \$_____ to settle all claims in this case. Within _____ days of the date of this agreement the Defendant shall issue a check payable to Plaintiff and his/her attorneys in the amount of \$_____, subject to the execution release referenced below. The balance of \$_____ shall be withheld regarding the Medicare lien in this case, also referenced below.
2. Defendant's counsel shall prepare a complete release of all claims as to all parties to include, among other standard terms, the following:
 - a. The subrogation lien of Medicare will be satisfied out of the settlement proceeds as stated above. Plaintiff shall provide the Defendant's counsel with written confirmation from Medicare regarding the amount required to satisfy the subrogation lien. Defendant's insurance carrier shall then issue a check for the subrogation amount made payable to Medicare and pay the balance of the settlement amount by a check payable to the Plaintiff and his attorneys.
 - b. Plaintiff shall pay all other liens and/or medical bills and hold Defendant harmless. In the event that the Medicare lien payment amount exceeds \$_____ Plaintiff shall also be responsible for payment of that amount.

MEDICARE SET-ASIDE (MSA) SETTLEMENT

1. Defendants' shall pay Plaintiffs the total sum of \$_____, subject to execution of the release set forth below.
2. Defendants' counsel shall prepare a complete release to include among other standard terms the following:
 - a. Confidentiality; and
 - b. Plaintiffs shall be responsible for the satisfaction of all medical expenses, liens/subrogation claims (including but not limited to MYHealthcare, Inc. and Medicare) and will indemnify Defendants in connection with same.
 - c. With respect to Medicare, the following shall apply:

The undersigned acknowledges that the settlement also allocates certain funds in the amount of _____ for future medical expenses, and that the parties have reasonably considered Medicare's interests in setting the amount of future medical expenses by reviewing past medical expenses and medical reports and/or considering the opinion of a physician or physicians regarding probable future medical expenses. The undersigned agrees that he is not entitled to collect Medicare benefits for any treatment relating to what was claimed and/or released in this settlement until the funds allocated for future medical expenses have been exhausted, and understands that if he collects Medicare benefits before the funds allocated for future medical expenses have been exhausted, CMS could refuse to pay future claims for benefits relating to the injury that is the subject of this settlement. All future medical care and costs are the sole responsibility of the undersigned. The funds being paid in this settlement, whether by lump sum or by periodic payment, are intended to ensure that the undersigned has funds from which to make payments for future medical care and treatment. In order to protect Medicare's interests and right of recover under § 1862 (b) of the Social Security Act (42 U.S.C § 1395y(b) (Medicare Secondary Payer Act), with applicable regulations found at 42 CFR Part 411, such payments are to be paid out of the proceeds of this settlement.

The MSA is based upon a good faith determination of the parties in order to resolve a questionable claim. The parties have attempted to resolve this matter in compliance with both state and federal law, and it is believed that the settlement terms adequately consider Medicare's interest and do not reflect any attempt to shift responsibility of treatment to Medicare pursuant to the Medicare Secondary Payer Act. The parties acknowledge and understand that any present or future action or decision of CMS on this MSA, or on the claimant's eligibility or entitlement to Medicare or Medicare payments, will not render this release void or ineffective, or in any way affect the finality of this settlement.

Said release shall be reviewed and approved by Plaintiffs' counsel. Thereafter, said release shall be signed by Plaintiffs.

IN THE SUPREME COURT OF ALABAMA

Case No

Style of the Case

MEDIATOR'S REPORT

In accordance with the Court's mediation order, mediation occurred on the following date(s) _____

The results of that mediation are indicated below:

1. _____ The parties reached an agreement that disposes of all issues and all claims. A motion to dismiss with be filed with the clerk of the court.
2. _____ A partial agreement was reached. The appeal will continue as to the remaining claims.
3. _____ An impasse as to all issues.
4. _____ Other. _____

If applicable, completed evaluations by the mediator, the attorneys, and the parties are attached hereto; the evaluations by the attorneys and the parties are in sealed envelopes. I have submitted this report and the evaluations within seven days after the conclusion of the mediation.

Done this _____ day of _____, 2015, in Birmingham, Alabama.

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Appellant:

Appellant's Counsel:

Appellee:

Appellee's Counsel:

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